NO. Supreme Court, U.S.

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In the

SUPREME COURT OF THE UNITED STATES

H. Richard Austin,
Petitioner Pro Se

vs.

Hanover Insurance Company &
Massachusetts Bay Insurance Company,
Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the term "fraud on the court" (FRCP 60b - savings clause) refers to a separate and distinct category of fraud, and what are the indispensable components of such fraud?

2. Whether an independent action based on "fraud on the court" can be barred because the fraud wasn't discovered within a certain time-period or for any other reason that permits the unconscionable judgment based on such a fraud on the court to be permanently out of reach (res judicata)? *Hazel-Atlas Glass v. Hartford-Empire*, 322 US 238.

3. Whether a uniform standard governs independent actions based on fraud between the parties *(U.S. v. Throckmorton*, 98 US 61 or *Marshall v. Holmes*, 141 US 589 etc.), and can that standard also be controlling regarding a "fraud on the court"?

4. Whether a signed waiver (S.Ct. Rule 15) constitutes a party's binding legal position regarding the facts expressed in a petition for a writ of certiorari, including where the case, that continues to involve the same operative facts, returns to the Supreme Court?

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II. JURISDICTION

Federal jurisdiction of the underlying insurance contract dispute is based on 28 USCS 1332 because the controversy involves citizens of different states and the amount in dispute. This petition for a writ of certiorari comes before the Supreme Court pursuant to 28 USCS 1254 and is taken from a clearly erroneous order of the Court of Appeals for the Second Circuit dated July 13, 2001.

III. SUBJECT MATTER

This petition concerns the improper dismissal of H. Richard Austin's "Independent Action for Relief from Judgment - Fraud Between the Parties/ Fraud Upon the Court." The action, brought pursuant to FRCP 60b - savings clause, demonstrates conclusively that Respondent Hanover Insurance Company's judgment (August 1, 1997) in the original judicial proceeding (95-CV-170 - District of Vermont) was obtained through a longstanding, fraudulent "scheme" involving its attornies, experts and a testing laboratory. These fraudulent activities, which extend over a period of several years, involve certified experts falsifying "scientific" evidence (*Daubert v. Merrell Dow*, 509 US 579) and then Hanover's attornies systematically undermining the judicial process so it could not function effectively and the fraud uncovered before trial. Thus, this complex fraud perpetrated for several years by a nationwide insurer of private homes was directed not only at its own policyholder but also at the Federal court system as well.

Among various, illegal acts demonstrating the fraud perpetrated on the court, Hanover's attornies participated in falsifying evidence during discovery in order to protect and enhance the original evidence falsified by the scientific experts; concealed for several months the whereabouts of an essential

witness (lab director) so his deposition could not be completed; participated in a forgery (falsely attributed to the American Society of Testing and Materials) in order to thwart an important, written discovery order; repeatedly submitted bad faith, signed documents to the court based on the fraud; withheld important evidence until just before trial; justified such devious conduct by false representations to the court; and conspired with the experts systematically to perjure themselves and present the falsified evidence at trial, etc.

In its written submissions to the various courts, Hanover has not disputed that its attornies and experts conducted this multi-year campaign of deceit and manipulation against petitioner Austin as well as the court. Furthermore, when the case was previously before the Supreme Court, the insurer submitted a waiver (S. Ct. Rule 15) instead of citing any alleged error in the factual statements and evidence supporting Austin's action. Furthermore, the erroneous order of the Court of Appeals upholding the dismissal did not conclude that the independent action lacks evidentiary support but instead that it is barred by the principles of res judicata.

IV. PRIOR DECISIONS

The complaint of the independent action, based on fraud inter parties and fraud upon the court, was docketed at the district court (Vermont) on September 2, 1999 (99-CV-252). It was dismissed on November 3, 1999 (Appendix I) in response to Hanover's motion falsely alleging res judicata on various, spurious grounds, including that certain non-existent post-trial motions were submitted in the trial court concerning the fraud issue. An appeal of the dismissal to the Second Circuit (99-9375) was denied by a motion's panel on May 4, 2000 (Appedix II) in connection with a motion by Austin seeking reduction of an excessive appeal bond granted after the

appeal was docketed at the Second Circuit. The denial occurred without briefs being submitted on the fraud issue, and it is not clear what grounds the panel relied on to make its decision. A petition for a panel rehearing was denied on July 6, 2000. (Appendix III)

A petition for a writ of certiorari to the U.S. Supreme Court followed (00-266), and Hanover responded with a signed waiver, not challenging any of the facts that document its fraudulent activities The petition was denied on October 10, 2000. Since the overwhelming evidence substantiating Hanover's fraud remains undisputed at all levels of the Federal court system, including that the judgment was *procured by* fraud perpetrated on the court, Austin next (October 31, 2000) submitted to the district court a "Motion for Relief from Order Granting Dismissal" and an accompanying "Motion to Vacate Fraudulent Judgment and Enter Judgment with Damages for Plaintiff". Both were denied on November 7, 2000 (Appendix IV and V).

A) The Second Circuit's Erroneous Order

Another appeal was made to the Second Circuit, and after submission of briefs and a hearing, a **clearly erroneous order (Appendix VI) was issued in which the appellate court misinterpreted Austin's new and independent action (99-CV-252) to be a motion - his "first Rule 60b motion." Since it was docketed 24 months after entry of judgment, it would have presumably been submitted out of time and therefore barred by the one-year time limitation of Rule 60b pertaining to motions. Additionally, on this basis the court concluded incorrectly that the fraud claims (both fraud inter parties and fraud upon the court) that are presented therein are barred on the grounds of res judicata because supposedly they were or "could have been raised" during the original proceeding. This includes the fraud**

Hanover perpetrated on the court, and in that regard, the order conflicts directly with the Supreme Court's decision in *Hazel-Atlas Glass v. Hartford-Empire Company*, 322 US 238 as well as Rule 60b - savings clause.

V. REVIEW OF THE CASE

1) Background

This dispute centers on a housefire that occurred on November 12, 1993, completely destroying Austin's home in Warren, Vermont. Insurance coverage of the dwelling and contents was provided by a fully paid, replacement value, homeowners' policy (HVV #2442889) issued by the Hanover Insurance Company and Massachusetts Bay Insurance Company. The amounts of coverage were determined by the company and their agent and approximately equalled the loss. Following the casualty, Austin complied with all terms for indemnification contained in the policy. This includes the Proofs of Loss that establish the financial parameters of the claim and were accepted by Hanover as fair and accurate. Thus the contractural damages are liquidated and readily ascertainable from the written documentation attached to the complaint.

A few weeks after the fire, Hanover was informed that the purpose of the claim was reconstruction of the dwelling, and a qualified builder acceptable to the insurers was chosen by the agent. Nonetheless, approximately six months after the fire, Hanover rejected the claim alleging that the house was burned down for financial gain.

2) Litigation Preceding The Independent Action

Austin responded with a lawsuit (August 16, 1994) in the state court of Saint Louis County, where he went to live with his family after the fire. Hanover removed the case to Federal court (E.D. Missouri) and obtained a change of venue to

Vermont. In the moving papers submittted by the firm of Brown and James, Saint Louis, emphasis was given to the importance of the alleged evidence that has proven to be a deliberate fraud. Thus from the outset, Hanover demonstrated a willingness to employ deception directed at the Federal court system in order improperly to manipulate the proceedings.

Discovery commenced in August 1995, extended over a period of 14 months, and was never completed. Following a five-day, jury trial preoccupied almost entirely with the issue of fire causation, the judgment adverse to Austin was entered (August 1, 1997). An appeal to the Second Circuit (97-9069) citied various forms of harmful error (mainly procedural) before and during the trial. The Second Circuit's opinion rejecting the appeal occurred on November 12, 1998. A Petition for a Writ of Certiorari regarding the same harmful error was denied on June 14, 1999.

Shortly before the petition was submitted to the Supreme Court or about one and a half years after the trial, information became available that demonstrates conclusively Hanover obtained the judgment through a fraudulent scheme that commenced only a few days after the housefire. **The purpose of the scheme was to fabricate "scientific" evidence that would give the false impression the fire was incendiary or deliberately set.** On the basis of this information, Austin submitted his independent action to the district court.

3) Insurer's Burden of Proof In Fire Insurance Disputes

The substantive law of Vermont governs the rights and obligations of the parties to the subject insurance contract that was executed within that state. This has been accepted by both parties. According to the law of Vermont and most states, the threshold issue (sine qua non) of the socalled arson defense to liability is proof that a fire was in fact deliberately set. *Westchester Fire Insurance Company v. Deuso* 146 Vt. 424,

428, 505 A.2d 666 (Supreme Court of Vermont , 1985) ("...had to find ... that the fire had an incendiary origin." The supporting cases cited therein from across the country indicate that any circumstantial evidence relied upon in this regard must be very strong and virtually indisputable. Some examples: *Boone v. Royal Indemnity Company* 460 F.2d 26, 28 (10th Cir., 1972) ("Several pounds of explosive substance had been placed in the building... explosion preceded the fire.."); *Gregory's Continental Coiffures and Boutique v. St. Paul Fire & Marine Insurance* 536 F.2d 1187, 1188 (7th Cir., 1976) ("...five plastic drums in the shampoo room... contained gasoline."); *Great American Insurance Co. v K& W Log, Inc.* 591 P.2d 457, 459 (Court of Appeals, Washington, 1979) ("... 600 to 700 pounds of Trojan dynamite had been used..")

To meet this substantial burden of proof, the opinion of experts in the field of fire investigation is often used. Federal evidentiary standards control the admissability of such opinions, principally the landmark *Daubert v. Merrell Dow* 509 US 579, 125 L.Ed.2d 469 (1993). **Commencing only a few days after the fire and long before any dispute arose between the parties, however, Hanover initiated the scheme that was intended to render such legal standards (both state and Federal) a virtual nullity. This involved cleverly mimicing certain techniques employed in the science of fire investigation, including falsifying lab tests of alleged debris samples . In this way Hanover deliberately and unlawfully sought to manipulate the situation so that it could prove anything regarding the fire's cause that might serve its interests**. Over the years a significant number of professionals in several states became involved in the scheme, and the prompt, almost routine way it was initiated suggests that at least some of these individuals have long experience in this type of activity. It is the natural inclination of an insured party to rely on the insurance company's expertise to determine a fire's cause.

Unfortunately, this creates a situation that can invite the type of fraud involved here against which a policyholder is virtually defenseless. Based on the well-documented and undisputed facts of Hanover's scheme, Petitioner strongly believes that this episode is not an isolated episode regarding the field of fire investigation in general or the business practices of this insurer.

4) Investigations Of The Firesite

Pursuant to a voluntary release provided by Austin, Hanover conducted the investigation of the site that supposedly would objectively determine the fire's cause. Austin personally built most of the house over a period of ten years and considered it important to identify a cause prior to reconstruction. To this day, he still considers the wood stove the most likely cause. It was connected to a tall chimney with a strong draft and had previously overheated a number of times, resulting in at least two, serious chimney fires that damaged the internal flues. In exchange for the release that allowed unlimited access to the site, Hanover agreed to share the results of its investigation. As a result, Austin did not have his own investigator. Hanover did not keep this commitment voluntarily, however, and Austin was only able to obtain some preliminary information regarding this supposed "scientific" evidence through a court hearing and order in early 1996, or about two and a half years after the fire.

Austin also provided a voluntary release to the Vermont State Police so they could participate in the work at the site. He did so assuming they possessed some specialized expertise that might be of assistance. Although the fire occurred on November 12, the work didn't take place until November 15, 16 and 24. Previously the debris was too hot. The police investigation, which occurred on the 15th and 16th, utilized a dog trained to detect hydrocarbon or petroleum-based substances in fire debris. The dog reacted a number of times outside and inside the ground floor level of the house - principally the recreation room that for

eight years was the former garage. In that area Austin once kept his cars and worked on various machinery, including a tractor, chain saws, etc. Tests at the New York State Crime Lab were all negative, and it has never been determined what the dog might have detected.

The insurers' fire investigator, George Wilson of Douglas G. Peterson & Associates, Greenfield, Massachusetts, was present during the police investigation and also worked by himself at the site on November 24. On that occasion he examined the utility/laundry rooms, the only area of the ground floor not examined by the dog. His work done on the 24th provides the basis for Wilson's report that supposedly established that the probable cause of the fire was an accelerant being poured in the laundry room area. On its face the report appears to be very professional. It utilizes technical terminology in abundance and throughout cleverly mimics scientific methodology, thus creating an illusion of objectivity.

The information that has gradually emerged over a period of several years demonstrates, however, that the report is nothing more than a cynical fabrication intended to serve Hanover's objective of thwarting Austin's claim. Interestingly enough, while discovery was in progress, Wilson explicitedly repudiated all aspects of his own report at his deposition. After discovery was closed, however, he once again reversed himself and alleged at the trial that he really found what he thought he did. On both occasions he was under oath and knew that he was. (The amended complaint specifically takes note of Wilson's contradictory statements under oath and those of other Hanover experts - Section 21.) As stated therein, "Various contradictory and unscientific statements and actions of Defendants' experts indicate that they were attempting to distance themselves from a lucrative project gone wrong." This was caused by a revealing mistake that was made when the evidence was originally falsified, ultimately causing the scheme

to unravel. (Subsection (b) reviews Wilson's sworn statements repudiating his own report, which are contained in evidentiary attachment no. 12 to the complaint.)

V. REASONS FOR GRANTING THE WRIT

1) Hanover Employed A Premeditated Scheme To Falsify "Scientific" Evidence Regarding The Fire's Cause

While at the site on November 24, George Wilson took numerous photographs and collected eight samples of debris from the utility/laundry room area. The debris was supposedly shipped to the Mercury Research Lab in Cary, North Carolina where analytical tests were conducted on a gas chromatograph/ mass spectrometer (GCMS). It is further alleged that two of the eight tests were positive for an accelerant that initially was identified as kerosene. Later this was changed to No. 2 fuel oil or the type of home heating oil used in the residential boiler of Austin's house.

It is now beyond any reasonable doubt, however, that these tests are the centerpiece of an elaborate scientific fraud and were ordered from the lab before Wilson returned to the site. **In essence, George Wilson went back there on November 24, 1993 for the sole purpose of fabricating an investigatory report that would utilize the fake lab tests. Thus, the tests were the centerpiece of the scheme and intended to provide the hard evidence supporting a falsified opinion of incendiarism that Douglas G. Peterson & Associates was being paid handsomely by Hanover to produce under the guise of scientific inquiry.** Apparently, carelessness borne of over-confidence caused the scheme to unravel and the true facts regarding Hanover's socalled "scientific" evidence to emerge.

A) The Experts' Mistake - Date/Time Discrepancy Of The Falsified, GC/MS LabTests

The two, allegedly positive tests (samples #4 and #6) are dated respectively November 25, 1993, 2:32am (sample #4) and November 25, 1993, 4:00 am (sample #6). Such a date/time is generated automatically by a GC/MS at the inception of a test and encrypted along with the rest of the data in binary code (computer language). It cannot be altered later without destroying a significant portion of the test file. The date/time is produced by an internal clock that continues to run automatically even when the computer is turned off because it is supported by a CMOS battery. These batteries are extremely reliable and long-lasting. In the unlikely event that one failed, any date/time would be lost along with the computer's BIOS (basic in/out system or operational instructions). Hence the computer would not be able to function correctly when it is started. (Complaint, sections 10, 11 - evidentiary attachment no. 5a).

After spending most of November 24 at the site, Wilson had to drive back to the offices of Douglas G. Peterson & Associates in Greenfield, Massachusetts (about five hours), sort and package the samples and ship them to Cary, North Carolina, which is about one-thousand miles away. After reaching the lab, they had to be unpacked and undergo extensive preparation. This step alone is an overnight process. All of this, including transport over such a long distance, would have had to take place in only a few hours so the tests could be performed in the early morning of November 25. Obviously this is impossible. **Hanover and its experts have never been able to provide a scientifically plausible explanation for the revealing date/time discrepancy** of the lab tests that allegedly support George Wilson's opinion of incendiarism. Instead on the sworn record they have only made overtly false statements on the subject that contradict basic, scientific facts regarding the design of a GC/MS as well as the lab's own written documents.

B) Revealing Trial Testimony Of Concealed Witness (Lab Director)

At the trial Jimmy Pau, a chemist who is the technical director of the lab, gave false testimony with the active assistance and encouraement of attorney Gregory Clayton in order to deceive the jury about the tests and their lack of authenticity (complaint - section 9, evidentiary attachment no. 4). According to Pau, the samples didn't reach the lab until November 30 and the tests conducted on December 1. He attempted to explain the discrepancy by alleging that the computer in the GC/MS had been turned off for six days because of electrical problems in the Cary, North Carolina area. Allegedly this stopped the internal clock that generates the date/time. Thus, when the computer was turned back on so the tests could be conducted, there was the discrepancy of six days. As Pau stated falsely under oath: "You have to set the date and the time... after you turn if off, you have to reset it... you need to reset the clock every time you run that." This explanation is obviously false and contradicts the way the clock in a GC/MS's computer functions, including the fact it is supported by the battery. Since there is this reserve source of power, it isn't necessary every time to reset the clock which continues to run on its own.

Furthermore, Pau testified that when the two tests took place, lab personnel didn't notice that the computer generated an erronous date/time six days before the date when the tests were supposedly performed. However, an electronic clock in a GC/MS is not like a mechanical clock that continues to display the time when it stopped running. With such an electronic clock, any date would be lost along with the computer's operational instructions (BIOS) in the event the source of power stopped and hence the clock. It would, of course, be impossible not to notice such a situation when the computer was restarted.

Equally revealing is the fact that Pau's pivotal testimony is

disproven by the lab's own written correspondence related to the analytical tests (complaint - evidentiary attachments nos. 6 and 7). The letter of November 30 refers to the samples identified by the dog , and the letter of December 2, 1993 to those supposedly acquired by Wilson. In these documents, which review the test procedures that were employed, specific reference is made to the lab's "quality assurance program" that calibrates the GC/MS so it functions accurately. This program was at that time conducted on a daily basis and therefore incorporated into the analytical procedure for the tests in question. As stated: "The QA program consists of a daily auto-tune of the mass spectrometer and a standard calibration run on the GC/MS system." Since this "auto-tune" program was being conducted each day, the computer that controls the GC/MS could not have been turned off for six, straight days. Based only on this written evidence from the lab itself, there is no other possibility except that Pau's explanation of the date-time discrepancy given under oath before a jury is deliberately false and the tests a fraud.

Finally it should be noted that personnel at the Mercury lab subsequently inserted a date at the top of the test diagram (chromatograph) in an area where (unlike the body of the test results) information, such as a title or file designation, can be added after the fact. This obvious attempt to obscure the date/time discrepancy, however, does not alter the fact that all available information clearly demonstrates that the tests are an overt, premeditated fraud.

C) Insurers' Knowledge Of Accidental Causation Of The Housefire

The events surrounding the falsified tests demonstrate a knowledge by Hanover, Wilson and other participants in the scheme that the fire was in fact accidental (complaint - section no. 13). Since the tests were already arranged before Wilson

returned to the site on November 24 and worked there by himself, it must have been concluded that there was no need to wait and test any additional samples he acquired that day. Otherwise, before going to all the trouble of setting up the phoney tests, Hanover would have waited for Wilson to review the important areas of the house not previously examined. When the earlier work was done at the site on November 15 and 16 (when the dog was there), Wilson, and perhaps others, must have detected something that indicated the fire was accidental. As previously noted, Austin continues to believe that the woodstove overheated, causing a serious chimney fire. Unfortunately the woodstove that weighed over 500 pounds and was rendered useless by the fire mysteriously disappeared from the site and has never been found.

The date/time discrepancy was the result of an unanticipated change in Wilson's schedule. Originally he returned to the firesite on November 22. However, Austin would not allow him to proceed without assurances that the results of his work would be shared. Hence, he had to come back on the 24, causing the revealing discrepancy which ultimately resulted in Hanover's fraud becoming known.

D) Hanover's Ongoing And Successful Campaign To Conceal The Scheme Before Trial And Also Fabricate Additional, Fraudulent Evidence

After the litigation commenced, Hanover and its attornies, Harold Eaton of Eaton and Hayes, Woodstock, Vermont, and then Gregory Clayton until recently of Downs, Rachlin and Martin, Burlington, Vermont, knowingly conducted an ongoing effort to conceal and enhance the fraudulent scheme. (After Hanover submitted the waiver to the U.S. Supreme Court, Downs Rachlin and Martin, left this dispute - that is, after the firm, one of the largest and most prestigious in New England, was paid over a period of years to perpetrate this

systematic fraud on the Federal court system. Attorney Clayton, who still represents Hanover and continues to advocate this serious fraud, is now connected with another firm.)

Among the various actions intended to deceive, the attornies submitted false, signed documents based on the fraudulent evidence (some specific examples noted in the complaint, sections 16a and 16b); continually thwarted the normal process of discovery so the true nature of the fraud could not be comprehended; and generated additional, falsified evidence intended to enhance the original, fraudulent evidence. **The objective of these and other carefully planned, illegal actions involving these "officers of the court" was nothing less than systematically to cripple the judicial process so it could not function correctly.**

During the discovery period which lasted 14 months, Hanover never willingly complied with any discovery request until a motion of some kind was before the court. Hanover would not even voluntarily produce for deposition the experts connected to its fire investigation. Afterwards, neither George Wilson or Jimmy Pau would sign their depositions, and Pau abruptly disappeared "somewhere abroad" for several months so his deposition was never completed (complaint - section 18). When Austin contacted lab personnel trying to ascertain where Pau was located, Attorney Clayton threatened sanctions, making clear his determination to prevent further contact with this important, material witness (complaint- section 19, evidentiary attachments nos. 8 and 8a). Since Pau did not reappear until discovery was closed, Austin was never able to finish questioning him about the date/time discrepancy of the falsified tests.

After Pau finally resurfaced, he cooperated with Attorney Clayton to produce a forged document falsely attributed to the prestigious American Society of Testing and Materials (complaint - section 20, evidentiary attachment no. 9). This includes a cover letter from Clayton endorsing the document as

authentic. The immediate purpose of this deceitful act was to nullify a written court order regarding the information promised by Pau at his deposition regarding the tests. However, this spurious document was only produced after discovery was terminated so Pau could not be questioned about this subject as well. **Thus, in the continuing effort to protect the fraud, Hanover and its surrogates, including the attornies, were even willing to engage in gross forgery regarding one of the most prestigious, scientific organizations (ASTM) in the country .**

Enhancing the Fraudulent Evidence

Determined to conceal as well as enhance the fraud, Hanover and Attorney Clayton conspired with the experts during discovery in order to produce additional, falsified evidence that was intended to give a renewed appearance of legitimacy to the fraudulent tests (complaint - sections 22-27). This involved the active participation of Stephen Houghton, director of fire investigation services at Douglas G. Peterson Associates (George Wilson's supervisor), who suddenly produced a liquid sample that was allegedly taken from the underground fuel tank at the site that had been unattended for almost three years. Another test was performed at the Mercury Lab, and not suprisingly, **it supposedly established with appropriate, scientific validation that the accelerant that was never found in the first place came from the fuel tank.**

The letter of June 21, 1996 on the subject from the Mercury Lab and the letter of August 20, 1996 from Stephen Houghton on same subject (complaint - evidentiary attachments nos. 13 and 14) are both addressed to Attorney Clayton and make clear how closely Clayton is now monitoring the deceptive activities of these experts. Previously, when the original, falsified tests were produced, the letters from the Mercury Lab (complaint - attachments nos. 6, 7 and 10) were

addressed to Stephen Houghton. who in turn wrote to Attorney Harold Eaton about the matter (complaint - attachment no. 11). However, based on the correspondence after the dating problem with the tests arose, it is apparent that the attornies exerted more direct control over the production of the fraudulent evidence, carefully controlling each step so no further mistakes would be made. This continues with the letter dated March 6, 1997 from the lab (complaint - attachment no. 16) and the letter dated May 19, 1997 from Stephen Houghton (complaint - attachment no. 17) regarding the next step in Hanover's attempt to prop up the scheme. Both letters are also addressed directly to Attorney Clayton.

With the spurious conclusion established that the alleged accelerant originated from the underground fuel tank, Attorney Clayton proceeded with the help of the experts and others to engineer the production of additional, phoney evidence in the continuing effort to reinstate the credibility of the original, falsified tests. In this regard another fake piece of socalled evidence suddenly made its appearance just as the case was placed on the trial calender. It consisted of some sort of paper stuffed in a can partially filled with fuel oil. The item was produced by Officer David Harrington of the Vermont State Police more than three and one-half years after the fire. (complaint - sections 23 - 25). He did so in spite of the fact that during his sworn deposition on July 2, 1966 (almost a year before Austin was actually informed), neither he nor Attorney Clayton disclosed the existence of this alleged evidence in response to repeated questions from Austin concerning relevant "physical" items of any kind in the possession of the Vermont State Police (complaint - section 24 , evidentiary attachment no. 15).

At the pretrial conference, Attorney Clayton in a direct verbal exchange deliberately deceived the court regarding the timing when Austin was finally informed about the substance in

the can. Clayton misled the court in this manner in order to gain admission of this spurious evidence produced more than a half-year after discovery was terminated so this latest addition to the fraudulent scheme also could not be scrutinized effectively (complaint - section 26, evidentiary attachment no.18). Note Clayton's explicit statement to the court - "The moment we got that report back from the lab we sent this to Mr. Austin..." However, compare this to attachment no 16, the letter from the lab dated March 6, 1997, in which the results of the test on the substance were reported to Clayton , and attachment no. 19, the letter dated May 21, 1997, when the information was finally sent to Austin or almost three months later than he alleged falsely to the judge in open court. Also note the letter dated May 19, 1997 belatedly generated by Stephen Houghton (complaint - attachment no. 17), in which the attempt is made to give the false impression that Clayton has just learned about the test results. However, in explicit language the letter from the Mercury Lab (March 6) demonstrates otherwise.

Allegedly the item that appeared so unexpectedly and was the subject of these additional machinations involving the experts and attornies was the newspaper (copy of the Wall Street Journal) found after the fire on Austin's front lawn near a stump he was cutting up with a chainsaw. The real newspaper, which originally was in his wheelbarrow, had actually been lying there for about a month. At the trial Austin saw the item for the first time, which was definitely not what had been on his lawn. Someone had stuffed a wad of paper in a gallon can of foul-smelling oil, which ultimately ended up in the jury room. The purpose was to convince the jury that something totally unrelated to the fire was closely involved in its cause. The powerful smell coming from the can would have pervaded the entire room, producing a very misleading, psychological impression on a lay jury already prejudiced by days of falsified "expert" testimony cleverly orchestrated by Attorney Clayton.

In all, four experts (Pau, Wilson, Houghton and Harrington) willingly perjured themselves regarding Hanover's fraudulent evidence in order to legitimatize it in the eyes of a lay jury with virtually no knowledge of fire investigation. An important aspect of this presentation was the repeated emphasis given by the attorney to the experts' credentials and professional experience, presumably suggesting that unquestioning reliance should be placed on their testimony.

2) Hanover's Bad Faith Motion To Dismiss And Other Submissions Rely On Distortion

While not denying or refuting the facts substantiating its fraud, Hanover opposes Austin's action by falsely asserting a generalized claim of res judicata supported by deceptive statements. Thus, the terse motion to dismiss alleges falsely that the only grounds for relief available to Austin was through a motion submitted within a one-year period that expired. However, the one year, time-limit for motions (Rule 60(b)(3) applies only to ordinary (common law) fraud and not the two kinds pleaded in Austin's action, especially fraud on the court.

To bolster its spurious claim, Hanover's motion deliberately misrepresents essential details regarding what actually occurred in the original proceeding . It states falsely that the subject matter of the complaint was fully adjudicated during the trial and that Austin submitted certain post-trial motions (plural) on the subject, the substance of which was rejected by the trial court, Court of Appeals and the Supreme Court. However, the information supporting Austin's independent action was not presented at trial, and no such post-trial motions were ever submitted. As stated falsely on page 2 of its motion:

> "The sole jurisdictional basis for Austin's independent action is FRCP 60(b)(1)&(3), which respectively permit motions for relief from judgment on the basis of 'mistake, inadvertence, surprise, or excusable

neglect' or for 'fraud'... Furthermore, the most cursory review of the Amended Petition reveals that Mr. Austin is again continuing to argue -- as he unsuccessfully claimed during trial, in his post trial motions, on appeals to the Second Circuit, and in his certiorari petition to the United States Supreme Court -- that the Mercury Research laboratory test results were fabricated evidence. The jury rejected this claim and that rejection has been affirmed by all reviewing courts..."

The purpose of this deception is, or course, to give the misleading impression that the fraud issue was disposed of and therefore cannot form the basis of an independent action. For the various reasons discussed, including the fact that he was prevented from completing the deposition of an essential witness (Jimmy Pau), Austin at the time of the trial was unaware of the full scope of Hanover's fraud, including that the lab tests supporting George Wilson's fabricated report were faked. The fact that there were no post-trial motions is easily confirmed by a simple examination of the court docket.

3) The Second Circuit's Order Mistakenly Concludes That Austin's "Independent Action" Is a Motion

In its order, the court refers three times to Austin's independent action as "his first Rule 60b motion" - (p.2, ln. 43 and p.3, lns 6 and 28). The court did so even though the action is specifically entitled an "Independent Action" and is based on the two types of fraud that sustain such an action pursuant to the savings clause (Rule 60b).

Austin's subsequent motion ("Motion For Relief From Order Granting Dismissal," (FRCP 60b(2),(3)) docketed on October 31, 2000 after certiorari was denied, was apparently regarded by the court as a second Rule 60b motion that was also submitted in error pursuant to the "first Rule 60b motion." Simultaneously on October 31, 2000, Austin submitted his

"Motion To Vacate Fraudulent Judgment And Enter Judgement With Damages For Plaintiff," renewing the request for relief sought by the independent action pursuant to Rule 60b - savings clause. If it is possible to reconstruct what occurred here, the court probably viewed this last submission as an independent action instead of the action itself (99-CV-252). Regardless of how one attempts to interpret the error, however, the end result is that the court concluded incorrectly that the fraud involved could only be addressed in the motion form that was time-barred (as Hanover alleged incorrectly in its motion to dismiss), and therefore on the spurious grounds of res judicata deprived Austin of the relief he correctly sought through an independent action and the two motions brought after it.

According to the principles of res judicata, subsequent litigation is barred where the same cause of action is involved *Herendeen v. Champion International Corporation* 525 F.2d 130, 133 (2d Cir. 1975): ("...essential facts and issues in the second case were present in the first."); *Interoceanica Corp. v. Sound Pilots, Inc.* 107 F.3d 86, 90 (2d.Cir. 1997): ("Same nucleus of operative fact...") And there must have been a ("final judgment on the merits.") *Federated Department Stores, Inc. v. Moitie* 452 US 394, 69 L.Ed. 2d 103, 108 (1981). In regard to Austin's independent action, however, the cause of action is not at all the same because completely different facts are now before the court, which demonstrate not only fraud against the opposing party but also upon the court itself. Furthermore, because essential information was kept from the jury by Hanover's dishonest litigation practises, the judgment was not rendered "on the merits."

In *Commissioner v. Sunnen*, 333 US 591, 597 (1948), however, the Supreme Court makes clear, however, that the principles of res judicata do not serve as an absolute bar to future litigation:

The judgment puts an end to the cause of action,

which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. (emphasis added)

4) The Second Circuit's Order Conflicts With *Hazel-Atlas Glass v. Hartford-Empire* 322 US 238.

On the erroneous grounds that "Austin's claims of fraud....were or could have been raised in the trial court, or on direct appeal to this court." (p.3, lns. 23-5), (underlining added), the appellate court also denied relief for fraud on the court, a species of fraud that *always* merits relief. *Moore's Federal Practise* 60.81[2], 60-226, 3rd Edition Nonetheless, the Second Circuit asserted that what constitutes a claim of fraud on the court must be dealt with by the aggrieved party in the original action if it is allegedly possible to do so. **Thus the Second Circuit applied what amounts to the same standard to fraud on the court as fraud inter parties, implying that there is no substantive difference between the two forms of fraud.** (See section No 5 below regarding fraud inter parties).

In *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 US 238, 88 L.Ed 1250, 1256, however, the Supreme Court took the very different position that fraud on the court is a form of fraud unique unto itself. In addition, the court specifically avoided placing the burden on the opposing party of addressing it within a specific timeframe. The court concluded ("[that] surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants.") And additionally: ("[the fact] that Hazel was not diligent in uncovering these facts, we already have pointed out that such evidence would not in this case change the result.") *Hazel*, fn. 5 at 1257.

A) Questions Linger Regarding The Nature And Scope Of A Fraud On The Court - The "Nebulous Concept"

In the 1946 revised version of Rule 60b, relief for the first time was provided from a judgment on the grounds of "fraud on the court". Reinterating the position taken by the Supreme Court in *Hazel Atlas* , the advisory committee states:"The rule expressly does not limit the power of the court when fraud has been perpetrated upon it to give relief under the savings clause." Appropriately the committee cites *Hazel Atlas* but does not specifically define the term or state how it should be applied. To this day questions persist as to the full scope of the term as referred to in the Rule. In *Toscano v. C.I.R.* 441 F.2d 930, 933-934 (1971), the Ninth Circuit states the point:

> The distinction between "fraud" on the one hand and "fraud on the court" on the other is by no means clear, and most attempts to state it seem to us to be merely complilations of words that do not clarify.... What is meant by ' defile the court itself?' What is meant by "fraud perpetrated by officers of the court?' Does this include attorneys? Does it include the case in which an attorney is deceived by his client and is thus led to deceive the court.

Also see *Great Coastal Express v. International Brotherhood of Teamsters*, 675 F.2d 1349, 1356 (4th Cir., 1982): ("The Federal Courts that have struggled with the definition of "fraud on the court" in the context of Rule 60(b) have found such a definition elusive.") In *In Re Genesys Data Technologies*, 204 F.3d 124, 130 (2000), the Fourth Circuit recently went even further referring to the term as ("that otherwise nebulous concept.")

Such fraud has been variously described as that species ("which seriously affects the integrity of the normal process of adjudication.") *Gleason v. Jandruko,*860 F.2d 556, 560

(2d.Cir.1988); *In Re Intermagnetics America*, 926 F.2d 912, 917(9th, 1991): ("... fraud [that] harms the integrity of the judicial process."); *In Re Levander*, 180 F.3d 1114, 1119 (9th. Cir., 1999): ("...must harm.."); *Broyhill Furniture v. Craftmaster Furniture* 12 F.3d 1080, 1086 (Fed. Cir, 1993): ("...impartial functions of the court have been directly corrupted."); *Bulloch v. United States* 721 F.2d 713, 718 (10th Cir., 1983): ("... directed to the judicial machinery.")

While uncertain of the full implications of the term, the circuits have attempted to deal with the issue by copying the *Hazel- Atlas* model to one degree or another, emphasizing either a scheme of some sort, attorney involvement in the falsification of evidence, or both.

> In *Hazel-Atlas*, the Supreme Court set aside a twelve-year old judgment on account of new evidence of a "deliberately planned and carefully executed scheme to defraud not only the Patent Office but (a) Circuit Court of Appeals" in order to obtain a patent. 322 US at 245-6....Proof of a scheme to defraud together with the complicity of the offending party's lawyers in *Hazel-Atlas* was, in the Court's judgment, conclusive evidence of fraud on the court. *Jandruko* at 559.

As stated in *Aoude v. Mobil Oil Corporation*. 892. F.2d. 1115, 1118-9 (1st Cir., 1989):

> "... a fraud on the court occurs where it can be demonstrated clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter... where witness and attorney conspire to present perjured testimony... where party, with counsel's collusion, fabricates evidence.

Also, *First National Bank of Louisville v. Lustig*, 96 F.3d 1554, 1573 (5th Cir., 1996): ("...unconscionable plan or

scheme.") Placing emphasis on the role of the attornies: *In Re Intermagnetics of America* 926 F.2d 912, 916 (9th Cir. 1991): (".... fraud by an officer of the court."); *Weese v. Schukman* 98 F.3d 542, 552, 10th Cir. 1996: ("...fabrication of evidence by a party in which an attorney is implicated."); *Greiner v. City of Champlin*, 152 F.3d 787, 789 (8th Cir., 1998).

Based on the currently accepted parameters of this illusive term, however, the facts documenting Hanover's fraud clearly substantiate Austin's claim of "fraud on the court", including both attorney involvement and a scheme to falsify evidence.

5) Austin's Action Also Qualifies For Relief On The Grounds of Fraud Inter Parties

Currently the standard supporting an independent action based on fraud between the parties is also subject to significant differences of opinion among the circuits. The majority still rely on the much-criticized distinction between intrinsic and extrinsic fraud. As stated by the Fifth Circuit in *Browning v. Navarro*, 826 F.2d 335, 344 (5th Cir. 1987):

> intrinsic fraud, that is, fraudulent evidence upon which a judgment is based, is not grounds to set aside a judgment... Extrinsic fraud, that is , fraud that was not the subject of the litigation, that infects the actual judical process, is grounds to set aside a judgment as procured by fraud.

Also *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981): ("maintained only for extrinsic fraud.") Similarly, in *Great Coastal Express v. International Brotherhood of Teamsters*, 675 F.2d 1349, 1357-8 (4th Cir. 1982), the Fourth Circuit observes that an independent action only rests on extrinsic fraud ("to justify relief...notwithstanding the considerable criticism leveled at the intrinsic/extrinsic distinction.")

Some circuits, however, disregard the distinction entirely.

In *Gleason v. Jandruko* 860 F.2d 556, 560 (1988), the Second Circuit quotes *Averbach v. Rival Mfg. Co.* 809 F.2d 1016, 1022 (3d Cir., 1987): ("...[the] extrinsic-intrinsic distinction which is based on a statement in *U.S. v. Throckmorton* 98 US 61 was overruled if it was ever the law by *Marshall v. Holmes* 141 US 589..."). Continuing to quote from 11 C. Wright & A. Miller, *Federal Practise and Procedure* 2868 at 240 -1 (1973): ("[the] distinction between extrinsic and intrinsic fraud is 'most unfortunate, if true. [It] rests on clouded and confused authorities, its soundness as a matter of policy is very doubtful, and it is extremely difficult to apply. It ought not to persist as a limit on independent actions under Rule 60(b).") Thus in the Third Circuit, the division between the two types of fraud is not recognized at all. *Bandai America v. Bally Midway Manufacturing* Co. 775 F.2d 70, 73 (3d.Cir., 1985): ("...in this circuit no significance is attached to the distinction... between intrinsic and extrinsic fraud.")

More than a decade after *Throckmorton*, the Supreme Court in *Marshall v. Holmes* 141 US 589, 596 postulated a different standard that emphasizes among various elements the lack of fault or blame attributable to the party bringing the action. Pursuant to the dicta in *Marshall*, the generalized requirements that support such an independent action have been stated as follows: a judgment which ought not, in equity and good conscience, to be enforced; fraud, accident or mistake which disadvantaged the injured party; the absence of fault or negligence by that party; and the absence of any adequate remedy at law. *National Surety Co. v. State Bank of Humboldt* 120 F. 593. 597 (8th Cir., 1903); *Bankers Mortgage Company v. United States* 423 F. 2d 73, 77 (5th Cir., 1970). All of these factors are notably present in Austin's independent action.)

For more than a century the *Throckmorton* opinion has nonetheless survived *Marshall v. Holmes* through the continued use of the intrinsic/extrinsic fraud analysis, giving rise to

conflicting standards regarding independent actions at both the state and Federal levels. While not recognizing the distinction, the Second Circuit relies on what might be regarded as a stringent blamelessness standard traceable to *Marshall.* Thus it states in *Gleason v. Jandrucko* at 560: ("The aggrieved party must be able to show that there was no opportunity to have the ground now relied upon to set aside the judgment fully litigated in the original action.") (Compare to the First Circuit that of late has stated the point somewhat differently: ("that it [the fraud] prevented the party from presenting his case.")) *Geo. P. Rentjes Co. v. Riley Stoker Corporation,* 71 F.3d 44, 48 (1st Cir., 1995).) However, **in the Second Circuit and probably most other circuits, Austin's independent action also warrants relief on the ground of fraud inter parties.**

6) Previously Before The Supreme Court, Hanover Cited No Error In The Evidentiary Facts That Support Austin's Action

The petition for a writ of certiorari previously submitted to the court about this matter (00-266) presented at length the identical set of facts regarding Hanover's fraudulent scheme. In Supreme Ct. Rule 15, the respondent's counsel is "admonished [to] address any perceived misstatement of fact or law" or otherwise any objection "may be deemed waived." The admonition of Rule 15 and its scope is unequivocal. The continuing significance of a waiver such as Hanover's is at issue in this petition. Examples of what Hanover did not dispute and in effect accepted as factually correct and true:

- "This Petition concerns the erroneous dismissal of an independent action (FRCP 60b - savings clause) that seeks to vacate **a judgment obtained by an insurance company through fraud.** (p.1).. concerns a situation in which an insurer has employed its considerable resources and knowledge to perpetrate fraud on its own policyholder and void a valid

insurance policy." (p.19)

- "Hanover's motion (to dismiss) containes only deliberate misrepresentations and no factual information disproving the fact the insurer perpetrated such a fraudulent scheme. Therefore, **the motion itself is grossly fraudulent and brought before the court in deliberate bad faith**." (p.16)

- "....only a few days after the fire, Hanover deliberately set in motion an elaborate scheme intended to manufacture spurious, "scientific" evidence that would make the subject fire appear to be intentionally set..." (p.2)

- George Wilson's "Scene Examination Report" purports to be his scientific analysis of the firesite... Wilson concluded that the subject fire was incendiary... the report... cites various, alleged evidence that demonstrates an accelerant was poured on the ground floor level of the house. The principal supporting evidence is two, lab tests that supposedly identified the accelerant... What Hanover and its experts, including Wilson, have never disclosed, however, is that the tests are fraudulent and were prearranged before Wilson returned to the site on November 24. **Essentially fire investigator George Wilson went back there for the sole purpose of fabricating a supposedly "scientific" report that would utilize the falsified tests**." (p.8)

- "The events surroundng the falsified tests demonstrate a knowledge by Hanover, Wilson and other participants in the scheme that the fire was accidental." (p.11)

- "After the litigation commenced in August 1994, Hanover and its attornies ... embarked on a continuing effort to conceal and also enhance the fraudulent scheme. Among others, their various deceptive actions include submitting false, signed documents based on the fraudulent evidence; perverting the normal process of discovery so the true nature of the fraudulent evidence could not be comprehended; and generating additional, phoney evidence intended to enhance the original, falsified

evidence. The purpose of these and other illegal actions was at all times to manipulate the judicial process so it could not function correctly." (pgs. 11-12)

VI. CONCLUSION

1) The erroneous order of the Court of Appeals (July 13, 2001), which improperly upholds the dismissal of petitioner's independent action, misinterprets the nature of that action and also bars a valid claim for "fraud on the court" in conflict with a long-standing U.S. Supreme Court precedent and Rule 60b - savings clause itself.

2) The legal context of this case (FRCP 60b - savings clause) is characterized by uncertainties among the circuits, especially regarding what constitutes "fraud on the court." This essential section of Federal procedural law confers on aggrieved litigants the ability to challenge unconscionable judgments rooted in complex frauds that might not be detected right away, such as those based on expert scientific testimony and evidence.

3) The implications of this dispute go beyond the interests of the two parties and affect potentially any homeowner who has a policy of insurance intended to protect a dwelling in the event of a casualty. The facts presented here demonstrate vividly how the scientific method can be falsified in order to fabricate non-existing evidence involving physical phenomenon, especially in connection with housefires. As previously stated, it is unlikely that this situation is an isolated episode regarding the practises of this insurer or the field of fire investigation in general. If the revealing mistake with the dating of the GC/MS tests had not occurred, it would be extremely difficult, if not impossiible, to uncover this type of fraud after the fact.

The resources of a large, national insurer dwarf those available to the average member of the public, especially when those resources are utilized to employ dishonest experts and

attornies skilled in disrupting the judicial process. The opportunities for fraud available in this type of inequitable situation have obviously not been lost on Hanover.

4) In its present form, this matter is grossly unfair to petitioner Austin, especially because a significant part of the problem is of late traceable to a simple error by the appellate court - confusing an independent action with a motion brought pursuant to Rule 60 b.

5) The controversy is ripe for summary adjudication. The facts regarding Hanover's fraud are clear and undisputed and the legal issues, which are significant, warrant clarification by the Supreme Court. In the interests of justice as well as asserting the viability of the independent action as a means of addressing serious error (*U.S. v. Beggerly*, 524 US 38), the dispute should not be left in its current state, having been decided contrary to the undisputed facts and instead on the basis of harmful mistake and faulty law.

A) Relief Sought

It is also appropriate at this time that the relief sought in the petition of Austin's independent action should be granted. It is beyond question that Hanover's judgment was obtained through fraud and the dismissal of the independent action is erroneous. After more than seven years, the liability claim is fully proven, and there is no just reason not to afford to Austin the benefit of the insurance contract withheld through fraud and enter a judgment on his behalf. Furthermore, since Hanover perpetrated such a serious fraud on the court, the insurers should have deprived themselves of all standing on this matter.

Because Hanover denied the claim unfairly and employed fraud to justify its improper actions, the insurers acted with undeniable bad faith. Also see *Bushey v. Allstate* 670 A.2d 807, 809 (Supreme Court of Vermont - 1995) regarding general issue of first party bad faith claims:

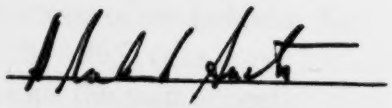
The contractural damages sought at this time are liquidated and can be readily calculated on the basis of the documentation attached to the complaint of the independent action (attachments nos. 21-23). These include the Proofs of Loss accepted by Hanover. In addition, Austin seeks reinstatement of his extra-contractural claims for emotional suffering and punitive damages based on Vermont law:

- Emotional Suffering: *Phillips v. Aetna Life Insurance* 473 F.Supp. 984 (D.Vt., 1979), citing *Sheltra v. Smith* 392 A.2d 431, 433 (Vermont, 1978): ("...outrageous conduct, done intentionally or with reckless disregard of probability of causing emotional distress...").

- Punitive Damages: ("...actual, not implied malice, and must be shown by evidence addressed especially to that question. It may be established by... nothing worse than a reckless and wanton disregard of the plaintiff's rights...") *Sparrow, Admr. v. Vermont Savings Bank* 95 Vt. 29, 33 (1921).

Because of the burdens and duress placed needlessly on Austin by Hanover's premeditated fraud that has continued for almost eight years both inside and outside the courtroom, these additional claims are now even more relevant to the dispute. Petitioner Austin should be given an opportunity to present these additional claims to a jury following the return of the matter to the district court.

Respectfully submitted,



H. Richard Austin
P.O. Box 220814
Kirkwood, MO 63122
314-821-2627

Dated: August 25, 2001

APPENDIX I

(Encribed order on the side of Hanover's Motion to Dismiss in the District Court of Vermont)

Motion to dismiss is GRANTED. The matter is clearly barred by res judicata. It is further certified that any appeal taken in forma pauperis would not be in good faith because such appeal would be frivolous. The remaining requests for relief are DENIED without prejudice.

Dated at Brattleboro, Vermont this 3rd day of November 1999.

"s/ J. Garvan Murtha"
J. Garvan Murtha, Chief Judge

APPENDIX II

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of May two thousand,

Present:

Hon. Thomas J. Meskill,
Hon. Jose A. Cabranes,
Hon. Robert A. Katzmann,
Circuit Judges,

Richard Austin,

Plaintiff-Appellant,

v. 99-9375

Hanover Insurance Company et al.,

Defendant- Appellees

Motions have been filed by appellant, pro se, for a "reduction of excessive bond for costs," and by appellees for a motion to dismiss based on appellant's failure to post the bond. Upon due consideration, it is ORDERED that the appellee's motion to dismiss is granted on the alternative basis that the appeal is frivolous for being barred by the doctrine of res judicata. See *Pillay v. INS*, 45 F.3d 14, 17 (2d. Cir. 1995) (this court has the inhereent authority to dismiss frivolous fee-paid appeals); *In re Teletronics Services, Inc.*, 762 F.2d 185, 190 (2d Cir. 1985) (discussing the doctrine of res judicata). Appellant's motion is denied as moot.

FOR THE COURT:
Roseann B. MacKechnie, Clerk
"s/Lucille Carr"

APPENDIX III

UNITED STATES COURT OF APPEALS
for the Second Circuit
United States Court House
40 Foley Square
New York 1007

Roseann B. Mackechnie
Clerk

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of July two thousand.

Present:

Hon. Thomas J. Meskill,
Hon. Jose A. Cabranes,
Hon. Robert A. Katzmann,
CIRCUIT JUDGES

H. Richard Austin,
Plaintiff - Appellant, Docket No. 99-9375
v.
Hanover Insurance Company and Massachusetts Bay Insurance Company, Defendants- Appellees

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A petition for panel rehearing having been filed herein by H. Richard Austin,
Upon consideration thereof, it is
Ordered that said petition be and it hereby is **DENIED**.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk
"s/ Beth J. Meador"
Administrative Attorney

APPENDIX IV

(Enscribed order on the side of H. Richard Austin's "Motion For Relief From Order Granting Dismissal.")

DENIED.
Dated at Brattleboro, Vermont this 7th day of November, 2000.

"s/ J.Garvan Murtha"
J.Garvan Murtha, Chief Judge

APPENDIX V

(Enscribed order on the side of H. Richard Austin's "Motion To Vacate Fraudulent Judgment And Enter Judgment With Damages For Plaintiff")

DENIED.
Dated at Brattleboro, Vermont this 7th Day of November, 2000.

"s/ J.Garvan Murtha"
J. Garvan Murtha, Chief

APPENDIX VI

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of July, two thousand and one.

PRESENT: HON. DENNIS JACOBS,
HON. FRED I PARKER,
HON. SONIA SOTOMAYOR,
Circuit Judges

RICHARD AUSTIN,
Plaintiff-appellant, 00-9521

-v.-

HANOVER INSURANCE COMPANY, MASSACHUSETTS BAY INSURANCE COMPANY
Defendants-appellees.

APPEARING FOR APPELLANT: H. Richard Austin, pro se
Kirkwood, MO

APPEARING FOR APPELLEE: Gregory S. Clayton, Aten, Clayton & Eaton PLLC, Littleton, NH.

Appeal from the United States District Court for the District of Vermont (Murtha, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the United States District Court for the District of Vermont be, and it hereby is, **AFFIRMED.**

In August 1997, a jury rejected H. Richard Austin's claim for fire insurance. The defendants, insurance companies, presented evidence at trial that Austin had set fire to his own house. Austin's direct appeal to this Court was unsuccessful, and we dismissed his subsequent appeal brought under Fed. R. Civ. P. 60 (b) on res judicata grounds. In this, his third trip to this Court, Austin appeals from the district court's orders denying his motions "to vacate fraudulent judgment and enter judgment with damages for plaintiff,"pursuant to Rule 60(b)'s independent action savings clause and "for relief from order granting dismissal," pursuant to Rule 60 (b) (2) and (3).

Austin re-alleges his previous claims that the insurers engaged in "premeditated" fraud and committeed fraud upon the court by conducting a bogus investigation, altering test results, and submitting false evidence to the court. Specifically, he argues that: (I) he has demonstrated "fraud upon the court" and therefore the judgment against him should not be enforced; (2) res judicata was inapplicable to his case since "different facts are now before the court" and the judgment against him was not on the merits since the defendants fraudulently withheld information from the jury; (3) the defendant insurers conceded fraud by failing to file a brief in response to Austin's petition for certiorari and are therefore estopped from denying it; (4) the defendant's motion to dismiss **his first Rule 60(b) motion** (emphasis added)

was submitted in bad faith since they failed to prove lack of fraud and incorrectly claimed that Austin had presented his claims of fraud at trial and in post-trial motions; and (5) the law of the case doctrine does not bar this Court from reconsidering its earlier decision-to dismiss his appeal from **his first Rule 60 (b) motion** (emphasis added) as frivolous- particularly since this Court lacked the benefit of briefing on the res judicata issue. He seeks relief from the initial judgment, an award of monetary damages, and "reinstatement of claims for emotional suffering and punitive damages."

We review a district court's order granting or denying a motion for relief from a final judgment pursuant to Fed. R. Civ. P. 60 (b) for abuse of discretion. See Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 729 (2d. Cir. 1998). The district court did not abuse its discretion in denying the Rule 60 (b) motions, because Austin failed to show newly discovered evidence, fraud or any other reason justifying relief under 60 (b). Austin's claim that the defendants waived any claims that they did not engage in fraudulent conduct when they failed to submit a brief to the Supreme Court is meritless. See Sup.Ct. R. 15 (1) and (2). Austin's claims of fraud are barred by res judicata as those claims were or **could have been raised** (emphasis added) in the trial court or on direct appeal to this Court. See St. Pierre v. Dyer, 208 F.3d 394, 399 (2d Cir. 2000). And to the extent Austin challenges this Court's dismissal of his appeal from the denial of **his first Rule 60 (b) motion** (emphasis added), we find no "cogent or compelling reasons" to disturb our dismissal of his prior appeal. Rezzonico v. H & R Block, Inc.., 182 F. 3d 144, 149 (2d Cir. 1999) (citation omitted).

We have considered all of Austin's other arguments, and we find them to be without merit.

FOR THE COURT:
Roseann B. MacKechnie,
Clerk of Court
By: "s/ Lucille Carr"